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In the Supreme Court of the United States

OCTOBER TERM, 1977

WILLIAM VAN LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C) is reported at 556 F. 2d 385. The opinion of the district court is reported at 409 F. Supp. 535.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1977. A petition for rehearing was denied on August 5, 1977 (Pet. App. D). On August 31, 1977, Mr. Justice Stewart extended the time in which to file a petition for a writ of certiorari to and including September 19, 1977 (Pet. App. E), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was probable cause for petitioner's arrest.

2. Whether the search of petitioner's suitcase, which he was carrying at the time of arrest, violated the Fourth Amendment.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to five years' imprisonment and a special parole term of three years. The court of appeals affirmed (Pet. App. C).

The facts relevant to petitioner's claims are set forth in the opinions of the court of appeals (Pet. App. 14-18) and the district court (409 F. Supp. at 539-540). They show that at approximately 10:50 a.m. on July 8, 1975, Susan Le Blanc, a ticket agent for American Airlines at Detroit Metropolitan Airport, informed Special Agent Paul Markonni of the Drug Enforcement Administration that a suspicious person using the name "J. Hall" had just purchased a first class ticket to Los Angeles, California, with currency of small denominations. According to Le Blanc, the man had checked a virtually empty suitcase and, although initially requesting a one way ticket, had bought a round trip ticket "because if everything went all right he would be coming back later that evening" (Pet. App. 14).[1]

[1]"J. Hall" seemed suspicious to Le Blanc because he appeared to match a "drug courier profile" developed by D.E.A. agents as a method of detecting narcotics traffickers. The characteristics listed on the profile include: (1) the use of small denomination currency for ticket purchases; (2) short trips to and from major drug import centers; (3) the absence of luggage or use of empty suitcases; (4) nervousness; and (5) use of an alias. See *United States* v. *McCaleb*, 552 F. 2d 717 (C.A. 6).

Agent Markonni immediately investigated Le Blanc's report and learned that the man's airplane reservation had been made earlier that week by telephone and that a telephone number had been provided as a contact. The number was listed to petitioner at an address in Detroit. Agent Markonni went to the residence and identified himself to the apartment manager, who spontaneously stated that the agent must have come to inquire about petitioner. When asked why he thought so, the manager told Agent Markonni that the Detroit Police Department was surveilling petitioner's apartment for alleged narcotics traffic. The manager's description of petitioner matched Le Blanc's description of "J. Hall."[2] Agent Markonni then contacted the police department, which informed him that petitioner had been arrested in February 1973 for possession of heroin and had been convicted of two non-narcotics related offenses.

At 4:00 a.m. on July 9, 1975, Agent Markonni was alerted by American Airlines that "J. Hall" was scheduled to return from Los Angeles early that morning. Accordingly, Agent Markonni and another D.E.A. agent went to the airport, where they observed petitioner (wearing the same clothing Le Blanc had described) leave the airplane and go to the baggage claim area. Because petitioner's suitcase did not appear on the luggage conveyor belt with that of the other passengers, he went to the baggage claim office. While waiting for his suitcase, petitioner noticed

[2]The manager also provided Agent Markonni with a description and license plate number of petitioner's car and expressed his belief that petitioner lived somewhere other than the apartment. A check disclosed that the license plate number was registered to petitioner at a second address in Detroit.

the agents and appeared nervous. As soon as he received the suitcase, petitioner proceeded through an airport terminal exit. At this point the agents approached petitioner and identified themselves, told him that they had reason to believe he was in possession of narcotics, and asked him to accompany them to an office inside the terminal. Once there, Agent Markonni asked petitioner whether his suitcase was locked. In response, petitioner bent over, reset the combination lock of the suitcase so that it could be opened, and stood up. Agent Markonni then opened the suitcase, which contained only a shaving kit and one piece of clothing. Inside the shaving kit the agents found a large quantity of heroin.

ARGUMENT

1. Petitioner contends (Pet. 6-8) that the agents lacked probable cause to arrest him when he claimed his suitcase at the airport. This claim was thoroughly considered and rejected by the courts below. As the court of appeals correctly held (Pet. App. 21-22):

> What Agent Markonni knew for the purposes of probable cause was that [petitioner] had taken a short trip, lasting less than one day, to Los Angeles, a distant city from which federally controlled narcotics had been illegally coming into Detroit; that [petitioner] had used an alias when paying for his ticket, which indicated the likelihood of an illicit purpose in the trip; that [petitioner] had taken with him to Los Angeles one suitcase that was virtually empty; that [petitioner] had a prior arrest for possession of heroin and had two non-drug related convictions; that [petitioner] had left with American Airlines a telephone number to an apartment which was noticeably under surveillance for narcotics traffic; that [petitioner's] personal residence was a

> place other than the apartment under surveillance for narcotics traffic, which supported the inference that the apartment under surveillance was a place used by [petitioner] for narcotics traffic; and that [petitioner] had returned to Detroit wearing the same clothes as when he had left.
>
> While these facts could be interpreted in such a way as to provide an innocent explanation for [petitioner's] behavior, Agent Markonni, as a prudent man, could reasonably conclude from all the facts put together that [petitioner] had gone to Los Angeles to obtain narcotics.

See *United States* v. *Prince*, 548 F. 2d 164, 165-166 (C.A. 6). Compare *United States* v. *McCaleb*, 552 F. 2d 717, 719-720 (C.A. 6).

2. Petitioner further contends (Pet. 8-10) that, even if the agents had probable cause to arrest him, the warrantless search of his suitcase was invalid under this Court's decision in *United States* v. *Chadwick*, No. 75-1721, decided June 21, 1977.[3]

a. In *Chadwick*, this Court held that federal law enforcement agents who had arrested several suspects, seized a footlocker from the trunk of their car, and

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[3]Petitioner challenges the agents' failure to obtain a warrant for the first time before this Court, having argued below only that his arrest was invalid and that he had not consented to the search. The federal courts have repeatedly held that "where a party has shifted his position on appeal and advances arguments available but not pressed below, and where that party has had ample opportunity to make the point in the trial court in a timely manner, waiver will bar raising the issue on appeal." *United States* v. *Braunig*, 553 F. 2d 777, 780 (C.A. 2) (citations omitted). See also *United States* v. *Lovasco*, No. 75-1844, decided June 7, 1977, slip op. 5, n. 7; *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147, n. 2; *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16.

transported it to the agents' offices, were constitutionally required to obtain a warrant before searching its contents. The Court concluded that once the agents had seized the locker, gained "exclusive dominion" over it, and arrested its owner, there was no exigency requiring an immediate search and that a warrantless search was therefore unreasonable (slip op. 11-14).

Chadwick did not purport, however, to change the settled construction of the Fourth Amendment permitting warrantless searches incident to a custodial arrest of the arrestee and property in his immediate possession, including items (such as a suitcase) being carried. See *United States* v. *Edwards*, 415 U.S. 800, 802-803; *United States* v. *Robinson*, 414 U.S. 218, 236; *Abel* v. *United States*, 362 U.S. 217, 239; *Draper* v. *United States*, 358 U.S. 307, 314. Thus, the Court observed in *Chadwick* that "[w]hen a custodial arrest is made, there is always some danger that the person arrested may seek to use a weapon, or that evidence may be concealed or destroyed" (slip op. 12) and it recognized that "[t]he potential dangers lurking in all custodial arrests make warrantless searches of items within the 'immediate control' area reasonable without requiring the arresting officer to calculate the probability that weapons or destructible evidence may be involved" (*id.* at 13). So here, the suitcase was "immediately associated with the person" of petitioner (*ibid.*), and the search was properly conducted as incident to and contemporaneous with petitioner's arrest. See *United States* v. *Gill*, 555 F. 2d 597, 599 (C.A. 6); *United States* v. *Prince*, *supra*, 548 F. 2d at 165; *United States* v. *Giles*, 536 F. 2d 136 (C.A. 6); *United States* v. *Cepulonis*, 530 F. 2d 238, 242 (C.A. 1), certiorari denied, 426 U.S. 922; *United States* v. *Eatherton*, 519 F. 2d 603, 610 (C.A. 1), certiorari denied, 423 U.S. 987; *United States* v. *Frick*, 490 F. 2d 666, 669-670 (C.A. 5),

certiorari denied, 419 U.S. 831; *United States* v. *Mehciz*, 437 F. 2d 145, 146-148 (C.A. 9), certiorari denied, 402 U.S. 974.[4]

b. The search of the suitcase also was justified by petitioner's consent.[5] Consent may be in the form of words, gesture, or conduct. *United States* v. *Griffin*, 530 F. 2d 739, 742 (C.A. 7); *Robbins* v. *MacKenzie*, 364 F. 2d 45, 48-49 (C.A. 1), certiorari denied, 385 U.S. 913. Here, when the agents asked petitioner whether his suitcase was locked, he responded by leaning over, resetting the combination lock so that the suitcase could be opened, and standing up. Petitioner also did not object when Agent Markonni opened the suitcase and searched its contents. These actions, as the district court correctly found (409 F. Supp. at 545), clearly constituted a consent to the search. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 220;

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[4]Unlike in *Chadwick*, where the search took place an hour and a half after the arrest and in an entirely different location, here the search of petitioner's suitcase was neither "remote in time [n]or place from the arrest" (*United States* v. *Chadwick*, *supra*, slip op. 13, quoting from *Preston* v. *United States*, 376 U.S. 364, 367).

Even assuming that *Chadwick* could be interpreted to cast doubt upon the continued validity of warrantless searches of chattels taken from an arrestee at the time of his arrest, it should not be applied to searches occurring prior to the decision. See *United States* v. *Reda*, C.A. 2, No. 77-1062, decided October 12, 1977; *United States* v. *Montgomery*, 558 F. 2d 311 (C.A. 5), certiorari denied, No. 77-5205, October 31, 1977. As this Court observed in *United States* v. *Peltier*, 422 U.S. 531, 535, in the context of the exclusionary rule, which is unrelated to the truthfinding function of the criminal process, new constitutional principles have been accorded prospective application only.

[5]Although the district court found that petitioner had consented to the search, the court of appeals declined to reach the issue in light of its finding that the search was incident to a valid arrest (Pet. App. 17, n. 3).

United States v. *Bertucci*, 532 F. 2d 1144, 1146 (C.A. 7), certiorari denied, 429 U.S. 895; *United States* v. *Griffin*, *supra*, 530 F. 2d at 743-744; *United States* v. *Turbyfill*, 525 F. 2d 57, 59 (C.A. 8); *Robinson* v. *United States*, 325 F. 2d 880, 884 (C.A. 5).

Moreover, petitioner's consent satisfied the standards of voluntariness announced in *United States* v. *Watson*, 423 U.S. 411, 424-425, and *Schneckloth* v. *Bustamonte*, *supra*, 412 U.S. at 227-234. The consent was given in the airport terminal and "not in the confines of the police station" (*United States* v. *Watson*, *supra*, 423 U.S. at 424); although petitioner was told he was suspected of carrying narcotics, he consented immediately, rather than after lengthy and "subtly coercive" questioning (*Schneckloth* v. *Bustamonte*, *supra*, 412 U.S. at 229); and the record discloses no overt act, threat of force, or other form of coercion suggesting that petitioner's consent was compelled.

Nor is there any indication that petitioner was mentally deficient or unable to exercise a free choice. To the contrary, petitioner had the equivalent of a high school diploma (Tr. 87), was "of at least average * * * intelligence" (409 F. Supp. at 545), and was familiar to some extent with the criminal process by virtue of his previous arrests and convictions. Finally, as noted above, at no time prior to or during the search did petitioner voice any objections. Cf. *United States* v. *Bertucci*, *supra*, 532 F. 2d at 1146. Measured by "the totality of all the circumstances" (*Schneckloth* v. *Bustamonte*, *supra*, 412 U.S. at 227), petitioner's consent to the search of his suitcase was voluntary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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*The Solicitor General is disqualified in this case.

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